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MAYER • BROWN



April 8, 2013

BY HAND-DELIVERY

The Honorable Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E Street, SW, Room #100
Washington, DC 20423-0001

Mayer Brown LLP
1999 K Street, N.W.
Washington, D.C. 20006-1101

Main Tel (202) 263-3000
Main Fax (202) 263-3300
www.mayerbrown.com

Adrian L. Steel, Jr.
Direct Tel (202) 263-3237
Direct Fax (202) 263-5237
asteel@mayerbrown.com

Re: Finance Docket No. 32760 (Sub-No 46), BNSF Railway
Company —Terminal Trackage Rights—Kansas City
Southern Railway Company and Union Pacific Railroad
Company

Dear Ms. Brown:

Enclosed for filing in the above-captioned proceeding are the original and ten (10) copies of BNSF Railway Company's Reply to the Kansas City Southern Railway Company's Request to Dismiss or Hold the Proceeding in Abeyance. A CD with the text of the pleading in Word format is also enclosed.

I would appreciate it if you would date-stamp the enclosed extra copy and return it to the messenger for our files.

Please contact me if you have any questions. Thank you.

Sincerely yours,

Adrian L. Steel, Jr.

Enclosures

cc William A. Mullins, Esq.
Michael L. Rosenthal, Esq.
All parties of record

ENTERED
Office of Proceedings

APR 8 - 2013

Part of
Public Record

BNSF-119

Before the
SURFACE TRANSPORTATION BOARD



Finance Docket No 32760 (Sub-No. 46)

BNSF RAILWAY COMPANY
—TERMINAL TRACKAGE RIGHTS—
KANSAS CITY SOUTHERN RAILWAY COMPANY AND
UNION PACIFIC RAILROAD COMPANY

REPLY OF BNSF RAILWAY COMPANY
TO THE KANSAS CITY SOUTHERN RAILWAY COMPANY'S
REQUEST TO DISMISS OR HOLD THE PROCEEDING IN ABEYANCE

Roger P. Nober
Richard E. Weicher
David T. Rankin
Courtney Biery Estes
BNSF Railway Company
2500 Lou Menk Drive
Fort Worth, TX 76131
(817) 352-2383

Adrian L. Steel, Jr.
Robert M. Jenkins III
Adam C. Sloane
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3237

COUNSEL FOR BNSF RAILWAY COMPANY

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Before the
SURFACE TRANSPORTATION BOARD

Finance Docket No 32760 (Sub-No 46)

BNSF RAILWAY COMPANY
—TERMINAL TRackage RIGHTS—
KANSAS CITY SOUTHERN RAILWAY COMPANY AND
UNION PACIFIC RAILROAD COMPANY

**REPLY OF BNSF RAILWAY COMPANY
TO THE KANSAS CITY SOUTHERN RAILWAY COMPANY'S
REQUEST TO DISMISS OR HOLD THE PROCEEDING IN ABEYANCE**

On February 27, 2013, BNSF filed an application in this proceeding for terminal trackage rights (hereinafter "Application") (BNSF-118). The terminal trackage rights sought by BNSF arise from the Lake Charles area condition imposed by the Surface Transportation Board ("STB" or "Board") in approving the UP/SP merger.¹ On March 19, 2013, The Kansas City Southern Railway Company ("KCS") filed a pleading styled as a "Reply" ("KCS Reply") to the Application. In its Reply, KCS requested that the Board dismiss or hold the proceeding in abeyance. Because KCS has sought affirmative relief in its Reply, BNSF is filing this Reply to KCS's request pursuant to 49 C.F.R. § 1104.13.²

¹ "UP/SP merger" refers to Finance Docket No. 32760, the merger of Union Pacific Railroad Company ("UP") and the companies affiliated with Southern Pacific Rail Corporation and Southern Pacific Transportation Company (collectively, "SP").

² See *UP/SP*, Finance Docket No. 32760, Decision No. 86 (served July 12, 1999), slip op. at 2 n.4 ("Because the NITL-25 reply seeks affirmative relief, the 'reply to a reply' filed June 8, 1999, by UP will be accepted for filing and made part of the record."). UP also filed a reply to BNSF's terminal trackage rights Application, but UP did not seek affirmative relief in its reply. Thus, this Reply does not address UP's reply except insofar as UP made the same arguments as KCS. To the extent leave from the Board is deemed necessary for the filing of this Reply, BNSF requests such leave in order to have an opportunity to respond to KCS's request for dismissal or abeyance.

INTRODUCTION

None of the arguments that KCS offers in support of its request to dismiss or hold the Application in abeyance has merit. Thus, KCS's argument that the STB should dismiss or hold this proceeding in abeyance pending the completion of a purported "contract" case brought by KCS against BNSF in a Louisiana federal district court is profoundly flawed. The Louisiana case is not a "contract" case that can resolve the parties' dispute as to BNSF's West Lake Charles access since KCS has sued BNSF, which is *not* a party to the agreements, but has not sued UP, which is *a* party to those agreements. Contrary to KCS's claim, the need for Board action is not dependent on how the federal court rules.

Equally meritless is KCS's argument that BNSF's Application should be dismissed or held in abeyance because BNSF allegedly has not undertaken the negotiation and arbitration processes contemplated by the Board in Decision No. 63. *See* Decision No. 63 (served Dec. 4, 1996), slip op. at 9-10. BNSF *has* sought to negotiate issues relating to its access to West Lake Charles and has made clear its desire and position that KCS and UP should arbitrate issues relating to BNSF's access. Moreover, KCS's pre-emptive filing of its "contract" case in Louisiana belies the genuineness of its suggestion that the parties should negotiate or arbitrate, and in fact establishes the futility of such a course of action.

Finally, the Board should reject KCS's arguments questioning the competitive need for direct BNSF service at West Lake Charles and claiming that BNSF's possible participation in what will be an open-bidding process for a rail line in Oklahoma is an attempt to reduce competitive rail options for West Lake Charles shippers. As explained below, these arguments are irrelevant and misguided.

Thus, the Board should reject KCS's request to dismiss this terminal trackage rights proceeding or hold it in abeyance, and should proceed to establish a Procedural Schedule consistent with the one proposed by BNSF in the Application.³

ARGUMENT

I. THE BOARD SHOULD NOT DEFER OR DISMISS THIS PROCEEDING IN DEFERENCE TO KCS'S DISTRICT COURT "CONTRACT" CASE

Citing the STB's longstanding practice of declining to interpret or enforce private contracts, KCS argues that it currently is pursuing a "contract suit" (KCS Reply at 15) against BNSF in the United States District Court for the Western District of Louisiana, and that the Board should dismiss or hold BNSF's Application in abeyance until the district court decides that case. KCS Reply at 15-18. This argument rests on false premises and should be rejected.⁴

KCS's characterization of its federal court case as a "contract" action is disingenuous. KCS has sued BNSF, which is *not* a party to the joint facility agreements, while not suing UP, which *is* a party to the agreements. UP clearly would be an indispensable party in a "contract" suit relating to the joint facility agreements, because an adjudication of the rights and obligations of the parties to the agreements cannot bind those parties if one of them—UP—is absent.

³ KCS (as well as UP) has requested that BNSF's proposed Procedural Schedule be revised to provide a 60-day (rather than a 30-day) period for the filing of replies and reply evidence. KCS Reply at 19 n.29. BNSF has no objection to such a revision.

⁴ KCS states that, "[i]f BNSF were to admit on the record to both the STB and the Western District of Louisiana that BNSF has no current contractual right under the four joint facility agreements to obtain direct access without KCS's consent, there would be no need to continue with KCS's federal district court action." KCS Reply at 13 n.20. BNSF cannot accede to this unreasonable demand. Because BNSF is not a party to the agreements, it is not in a position to determine whether such a concession is warranted. Moreover, BNSF believes that circumstances arising since Decision No. 63, including the failure of KCS and UP to arbitrate BNSF's direct access, have triggered a self-executing Section 11341(a) (now Section 11321(a)) override of the consent provisions of the joint facility agreements, thus rendering those provisions ineffective even in the absence of negotiation, arbitration, or Board action. BNSF has nevertheless filed the Application at issue here in deference to the Board's previously expressed preferences with regard to the processes for resolving BNSF's direct access to West Lake Charles shippers.

Nevertheless, KCS has elected not to sue UP. KCS's failure to name UP in what is alleged to be a "contract" suit is all the more problematic in that it was UP that entered into the agreements with BNSF and CMA, which the Board later modified and imposed as the Lake Charles area access condition, and it was UP that chose to accept the STB's condition by consummating the merger with SP.

In fact, KCS *cannot* bring a "contract" suit in court under the joint facility agreements, because each of those agreements has a mandatory arbitration provision.⁵ Thus, there not only is no current contract lawsuit to which the Board can defer, there *cannot* be one, because any such lawsuit brought against an actual party to the contract would be precluded by the mandatory arbitration provisions of the agreements.⁶ Thus, KCS's district court case will not be determinative of any issues relevant to the Board's adjudication of BNSF's Application.

Moreover, BNSF's Application does not raise issues relating to private contracts. Nor does it require the Board to construe or enforce any such agreements. This distinguishes this proceeding from virtually all of the cases cited by KCS on pages 15 to 18 of its Reply.⁷

⁵ For the convenience of the Board, we are attaching the cover page affixed to each agreement by KCS in the federal court case as well as the page(s) setting forth the mandatory arbitration provision of each agreement.

⁶ The fact that the pending federal court action here is not a "contract" case and has not been brought against a party to the contract distinguishes this matter from the two principal cases on which KCS relies, *Western Resources, Inc. v. The Atchison, Topeka and Santa Fe Ry. Co.*, STB Docket No. 41604 (decisions served May 17, 1996 and May 31, 1996), and *The Kansas City Terminal Ry. Co. and The Atchison, Topeka and Santa Fe Ry. Co.—Contract to Operate Exemption—in Kansas City, MO*, STB Finance Docket No. 32896 (served Nov. 20, 1996) ("KCT"). See KCS Reply at 15-17. Moreover, in *Western Resources*, the contract issue that the parties were trying by consent was directly pertinent to whether there was an issue within the Board's jurisdiction at all. That is not the case here. No matter how the joint facility agreements are construed, the Board has jurisdiction over BNSF's Application. *KCT* is also irrelevant here because, unlike in that case, the existence of a contract is not a consideration pertinent to the merits of the matter before the Board.

⁷ Strikingly, in one of the cases cited by KCS, the Board addressed issues within its exclusive or primary jurisdiction *before* referring the parties to the courts or arbitration to determine the issues

Rather than requiring the Board to construe or enforce private contracts, BNSF's Application, which seeks "bridge-the-gap" trackage rights in order for BNSF to implement a merger condition, raises issues that are squarely within the exclusive and primary jurisdiction of the Board.⁸

II. THE BOARD SHOULD REJECT KCS'S ARGUMENTS THAT THE PROCEEDING SHOULD BE DISMISSED OR HELD IN ABEYANCE UNTIL BNSF TAKES THE STEPS OUTLINED IN DECISION NO. 63

By filing a "contract" lawsuit, KCS has essentially rejected the negotiation and arbitration processes recommended by the Board in Decision No. 63. *See* Decision No. 63, slip op. at 9-10. Nevertheless, KCS urges the Board to dismiss or hold the terminal trackage rights Application in abeyance because BNSF allegedly has failed to utilize the very processes rejected by KCS, including negotiations and, if necessary, an arbitration. *See* KCS Reply at 1, 7-14

The premises of KCS's argument are incorrect. In its Application, BNSF explained that it has attempted to negotiate the dispute concerning BNSF's access to the Rosebluff Industrial Lead, which is the trackage at issue here. *See* Application at 7-9. BNSF also attached pertinent

relating exclusively to private contracts, a procedure that is the very opposite of what KCS asks the Board to do here. *See City of Peoria and the Village of Peoria Heights, IL—Adverse Discontinuance—Pioneer Industrial Ry Co*, STB Docket No. AB-878 (served Aug. 10, 2005), slip op. at 6 ("Until the Board removes its primary jurisdiction, no state court may apply the processes of state law").

⁸ That BNSF is seeking terminal trackage rights under the "bridge-the-gap" standard is apparent from the face of the terminal trackage rights Application. Thus, KCS's argument (*see* KCS Reply at 4 n.4) that the Application could be dismissed for failure to discuss the applicable standard (or to address operational questions that BNSF said it would discuss in depth when it submits its evidence) is meritless. So, too, is KCS's argument (Reply at 7 n.9) that BNSF proposes not to pay for the terminal trackage rights sought in this proceeding. It is BNSF's position that UP has the obligation to provide BNSF with the ability to directly access Lake Charles area shippers and so UP should be responsible for any terminal trackage right fees. *See* Application at 15-16. This does not mean that BNSF proposes to pay nothing for access to West Lake Charles. Rather, BNSF's payment obligations would be governed by the trackage rights fee agreements generally applicable to the merger-related trackage rights that BNSF received pursuant to the UP/SP merger, and UP would be responsible in turn for compensating KCS for BNSF usage of the trackage in accordance with the joint facility agreements.

correspondence to the Application. See Exhibits 1-9. In the evidentiary filing that BNSF is planning to make under the Procedural Schedule that BNSF proposed in the Application, BNSF anticipates providing additional details about face-to-face meetings and other communications with UP regarding BNSF access to the trackage.

Additionally, KCS's claim that BNSF has not attempted to negotiate directly with KCS (KCS Reply at 11) is erroneous. In fact, Exhibits 5 and 6 to BNSF's Application consist of an exchange of emails between senior legal counsel of BNSF and KCS on the issues. Moreover, nothing in Decision No. 63 directed BNSF to negotiate directly and unilaterally with KCS. BNSF's right to serve Lake Charles area shippers derived from agreements with UP and CMA, and from the Lake Charles area merger condition imposed by the STB in the UP/SP merger. BNSF is not a party to any of the joint facility agreements with KCS. In these circumstances, BNSF's focus on negotiating with UP is entirely reasonable, especially in light of the fact that the "50-50 Line" Term Sheet Agreement (see Application at 6) further confirmed BNSF's right to provide service to the Lake Charles area through direct train service. See *id.*⁹

KCS also argues that BNSF ignored a UP proposal for three-carrier talks on the Lake Charles access issues. Specifically, KCS asserts that UP proposed three-carrier talks in a February 4, 2013 letter, but that BNSF's only apparent response was to file the terminal trackage rights Application. See KCS Reply at 12 (referring to Exhibit 9 to BNSF's Application). To the

⁹ With regard to the "50-50 Line" Term Sheet Agreement, KCS argues that BNSF originally based its demand for direct access to the CITGO facility on that agreement, but that BNSF's previous STB filings did not list CITGO as a shipper to which BNSF obtained access under that agreement. KCS Reply at 11 n.16. This argument is a red herring. In the letter cited by KCS (Exhibit 1 to BNSF's Application for Terminal Trackage Rights), BNSF merely invoked the "50-50 Line" agreement's notice provisions, and BNSF has consistently maintained that its right to serve CITGO derives from BNSF Settlement Agreement, the CMA Agreement, and the Board's merger condition. For instance, in BNSF's April 1, 1998 progress report (BNSF-PR-7) in the UP/SP merger proceeding, CITGO was included in an attachment titled "UP/SP Served Facilities Accessed By BNSF Other Than As A Result of '50/50' Line '98 Agreement."

contrary, BNSF did not ignore UP's letter. Rather, in response to UP's February 4, 2013 request for a meeting, senior legal counsel of BNSF stated that BNSF would be willing to meet for three-carrier discussions, but as yet, UP and KCS have not set a time or place for such a meeting and, instead, KCS filed its lawsuit. Nowhere was it contemplated that BNSF should be required to negotiate or arbitrate after KCS filed a lawsuit. In any event, although BNSF has expressed its willingness to participate in further discussions about BNSF's direct access to West Lake Charles, KCS has provided no basis to conclude that further attempts at negotiation would bear any fruit.

Finally, KCS asserts that BNSF has made no attempt to seek arbitration of the dispute KCS Reply at 13-14. This claim is belied by correspondence included as exhibits to BNSF's Application. Specifically, in a December 14, 2012 email to KCS, BNSF's senior legal counsel stated that, "[i]f KCS has a concern with the direct service authorized by the Board and memorialized in our agreements with UP then it may initiate arbitration with UP under its agreement as suggested by the Board; but it may not unilaterally act to deny BNSF access." Exhibit 5 to BNSF's Application. And in a letter, dated January 9, 2013, to UP's George Sturm, BNSF's Sarah Bailiff stated that, if BNSF's direct access to the CITGO facility "requires resolution of the UP-KCS dispute under agreements to which BNSF is not a party, UP has had ample notice that it should have undertaken arbitration as noted by the Board in order to provide such access within the time frames set forth in the [Revised and Amended Settlement Agreement]." Exhibit 7 to BNSF's Application at 2. BNSF's correspondence clearly conveyed the message that KCS and UP should undertake arbitration. KCS's argument to the contrary elevates form over substance and is without merit, and it ignores KCS's rejection of arbitration evidenced by its filing of the Louisiana case. Thus, like so many of its other arguments, KCS's

argument about BNSF's alleged failure to request arbitration is misguided and rests on incorrect premises.

Further, it is highly doubtful that arbitration would materially advance the interests of West Lake Charles shippers in obtaining direct access to BNSF on reasonable terms. Given that BNSF is not a party to the joint facility agreements and so would not participate as a party in any arbitration, an arbitration under the joint facility agreements would have two competitors of BNSF—KCS and UP—determine the terms of BNSF's access.

The competitive interests of KCS and UP are obviously at odds with the interests of BNSF. There is, of course, nothing wrong with the fact that UP, KCS, and BNSF have conflicting business interests. However, in light of these opposed commercial interests, an arbitration between KCS and UP would only further delay the day when West Lake Charles shippers will have direct access to BNSF. Moreover, it is likely that an arbitration between KCS and UP would leave BNSF saddled with highly unfavorable economic and operational terms of access to West Lake Charles. Direct BNSF access to West Lake Charles under such unfavorable conditions will do little to benefit West Lake Charles shippers.

Thus, KCS's request to dismiss or hold these proceedings in abeyance pending further attempts at negotiation and pending a KCS-UP arbitration should be rejected.

III. THE BOARD ALSO SHOULD REJECT KCS'S ARGUMENT THAT BNSF'S REQUEST FOR TERMINAL TRACKAGE RIGHTS IS UNNECESSARY AND IS PART OF A SCHEME TO REDUCE COMPETITION

KCS argues that BNSF's request for terminal trackage rights giving BNSF direct access to shippers at West Lake Charles is unnecessary because BNSF has served West Lake Charles shippers for sixteen years via reciprocal switch and haulage. KCS Reply at 2, 5-6. KCS's argument is an inappropriate attempt to obtain a ruling on the merits before a factual record can be developed.

BNSF has proposed a Procedural Schedule providing for the development of a complete record. Pursuant to this proposed schedule, BNSF intends to submit evidence that will show that West Lake Charles area shippers, such as CITGO, have found that the existing indirect BNSF service has become increasingly uneconomical and that current commercial needs and plans dictate the need for direct BNSF service. By moving to dismiss or stay the proceedings now, KCS is attempting to short-circuit the orderly adjudicative process proposed by BNSF.

KCS also seeks dismissal of the Application because, according to KCS, the Application is an element of a scheme by BNSF to *reduce* competition for Lake Charles area traffic. The focus of KCS's contrived argument is BNSF's expression of interest in acquiring the Sooner Subdivision ("Sooner Sub") currently operated by Stillwater Central Railroad, a shortline railroad indirectly owned by Watco Companies, in Oklahoma. KCS Reply at 3, 4, 6-7. The Sooner Sub, according to KCS, serves Stroud, Oklahoma, which is the origin for crude oil moving to the CITGO refinery in West Lake Charles. KCS Reply at 6-7. KCS's argument about BNSF's interest in a possible acquisition of the Sooner Sub is irrelevant to the Application at issue here.

For one thing, KCS fails to inform the Board that, in the letter concerning BNSF's proposed Sooner Sub acquisition that KCS cites in and attaches to its Reply, BNSF expressly stated that, if it acquires the line, BNSF will preserve UP's existing competitive access. See Letter, dated September 11, 2012, from Matthew K. Rose, BNSF, to the Honorable Gary Ridley, Secretary of Transportation, Oklahoma Department of Transportation, at 2 (attached as Exhibit A to KCS's Reply). Thus, any potential acquisition of the line by BNSF clearly is *not* anti-competitive.

Moreover, even if BNSF's acquisition of the Sooner Sub would give BNSF exclusive access to Lake Charles-bound movements *originating* on the Sooner Sub, that fact would be irrelevant to whether BNSF should have direct access at the *destination* in West Lake Charles. The service options available to BNSF at West Lake Charles are not in any way related to competition at an originating point in Oklahoma.

Finally, KCS does not address the fact that the sale of the line will result from an open-bidding process, and that BNSF is one of at least four railroads that have made overtures with regard to acquiring the Sooner Sub thus far. See Zach Stoycuff, *Rail Line Sale Will Require Passenger Service Provision*, Tulsa World (published March 13, 2013) (available online at http://www.tulsaworld.com/article.aspx/Rail_line_sale_will_require_passenger_service_provision/20130313_16_A11_CUTL.IN868568) (reporting that in late 2012 four entities communicated with the Oklahoma Department of Transportation about acquiring the Sooner Sub). The other interested entities include UP and Watco. If KCS feels threatened competitively by the sale of the Sooner Sub, it can join the bidding.

In any event, it would be inappropriate to consider the BNSF interest in the Sooner Sub in *this* proceeding. BNSF's proposal has not been accepted, and there is no assurance that it will. Moreover, if BNSF does acquire the Sooner Sub, that transaction will be the subject of a separate Board proceeding. If KCS has any concerns about the acquisition of the Sooner Sub, it can raise them in that proceeding.

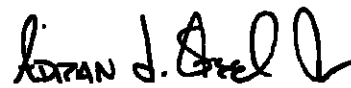
CONCLUSION

KCS's arguments for dismissing or holding this proceeding in abeyance are fundamentally flawed. There is no reasonable basis for the Board to stay the proceeding pending completion of KCS's manufactured "contract" lawsuit. Nor is there any substance to KCS's claim that BNSF has ignored the processes recommended by the Board in Decision No. 63. If

anyone has shunned those processes, it is KCS by, among other things, attempting to circumvent Decision No. 63 through litigation. Finally, KCS's arguments regarding BNSF's existing access to West Lake Charles and the Sooner Sub open-bidding process are irrelevant and misguided.

Thus, KCS's request to dismiss or hold the proceeding in abeyance should be denied, and the Board should proceed to institute a procedural schedule consistent with the one proposed by BNSF in its Application.

Respectfully submitted,



Adrian L. Steel, Jr
Robert M. Jenkins III
Adam C. Sloane
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3237

Roger P. Nobel
Richard E. Weicher
David T. Rankin
Courtney Biery Estes
BNSF Railway Company
2500 Lou Menk Drive
Fort Worth, TX 76131
(817) 352-2383

Counsel for BNSF Railway Company

Dated April 8, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of April, 2013, copies of the foregoing Reply of BNSF Railway Company To The Kansas City Railway Company's Request To Dismiss or Hold The Proceeding In Abeyance has been served by first-class U.S. Mail on all parties as listed on the Board's website for the service list in Finance Docket No. 32760.

A copy of the Reply of BNSF Railway Company To The Kansas City Railway Company's Request To Dismiss or Hold The Proceeding In Abeyance has also been served on counsel Union Pacific Railway Company and Kansas City Southern Railway Company.

A handwritten signature in black ink, appearing to read "Adrian L. Steel, Jr.", written over a horizontal line.

Adrian L. Steel, Jr.

BNSF-119

**Reply Of BNSF Railway Company
To The Kansas City Southern Railway Company's
Request To Dismiss Or Hold The Proceeding In Abeyance**

**Exhibit
Arbitration Provisions From Joint Facility Agreements
(Excerpted from Exhibits to Complaint in Western District of Louisiana Proceeding)**

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION**

**THE KANSAS CITY SOUTHERN
RAILWAY COMPANY,**

Plaintiff,

vs.

BNSF RAILWAY COMPANY,

Defendant.

Civil Action No. 5:13-CV-98

Judge _____

Magistrate Judge _____

**EXHIBIT TO THE KANSAS CITY SOUTHERN RAILWAY COMPANY'S
COMPLAINT FOR DECLARATORY JUDGMENT**

EXHIBIT 1 – 1934 AGREEMENT

- 10 -

~~(f) Indemnity: If either party hereto shall at any time pay or~~
be compelled to pay any sum or sums for which the other party is wholly or partially liable, or bound, under this Section 16, then such other party shall indemnify and hold such party harmless, and shall reimburse to it such sum or sums which shall be properly chargeable against it according to the terms of this Section 16, provided neither party shall be concluded by any judgment against the other party hereto unless it has had reasonable notice that it is required to defend or participate in the defense of any suit, or be so bound, and has had reasonable opportunity to make such defense or participate therein. When such notice and opportunity shall have been given, the party notified shall be concluded by the judgment as to all matters which could have been litigated in such suit.

17. CLASSIFICATION OF ACCOUNTS: The then current Classification of Accounts prescribed by the Interstate Commerce Commission shall govern all charges covering expenditures for additions and betterments and for maintenance except as herein otherwise specifically provided.

18. ARBITRATION: Should a controversy arise between the parties hereto that cannot be amicably settled by themselves with respect to the interpretation or performance of their obligations, rights or duties under the provisions of this agreement, it shall be referred to three disinterested competent arbitrators, of whom each party hereto shall choose one, and the two thus chosen shall select the third.

If the two arbitrators so chosen by the parties hereto cannot, within thirty days, agree upon a third arbitrator, said third arbitrator shall be selected by a Judge of the United States District Court for the District in which Lake Charles, Louisiana, is located.

The party desiring arbitration shall give written notice thereof to the other party, setting forth therein the matter in dispute and the name of its arbitrator. In the submission to arbitration it shall be provided that the arbitrators shall determine and adjudicate the questions at issue in accordance with the competent, relevant and material evidence introduced, and that in reaching their decision the said arbitrators shall be governed by the principles and rules of law or equity applicable to the questions under consideration. In the event the party upon whom such notice is served shall not within thirty days thereafter appoint an arbitrator and give notice thereof in writing to the party desiring arbitration, then the party desiring arbitration shall apply to said United States District Judge who shall select such second arbitrator, and the two thus selected shall choose a third. The three arbitrators shall promptly give notice to each of the parties to the controversy, at least ten days in advance, of the time and place set for hearing, and at the time and place appointed shall proceed, hear and determine the matter, unless for good cause (of which the arbitrators shall be sole judges) it shall be postponed. The determination, made in writing, of the arbitrators, or of a majority of them, after due hearing, shall be final and conclusive on the parties hereto.

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Each party shall pay for the services and expenses of the arbitrator chosen by or for it and of its witnesses, the losing party to pay for the services and expenses of the third arbitrator and for any stenographic expense, unless other provision therefor is made in the award.

19. TERM--SUCCESSORS AND ASSIGNS: This agreement and all of its terms, provisions and conditions shall inure to the benefit of and be binding upon the successors, lessors and assigns of the respective parties hereto until terminated by mutual consent of the parties hereto; Provided that if the New Orleans Company shall fail to pay the rental and other sums required of it, promptly when due, or shall fail to comply with its other covenants in Articles I and III, and such default in payment, or in compliance with other covenants, shall continue for a period of 180 days after written notice from the Kansas City Company specifying in which particulars it is in default, then the Kansas City Company may immediately terminate said grant and exclude the New Orleans Company from the jointly used tracks; provided further that any termination, except by mutual consent, shall not relieve the New Orleans Company from the obligation, which shall continue until such termination by mutual consent, to pay the rental provided in subdivision (a) of Section 6 hereof. Any receiver or receivers, trustee or trustees appointed for the Kansas City Company or its successors or assigns or any other party or parties coming into possession of the jointly used tracks shall take possession subject to the use thereof herein granted to the New Orleans Company, its successors or assigns, until this agreement is terminated by mutual consent of the parties hereto, their successors or assigns, as hereinbefore specified. If any receiver or receivers, trustee or trustees appointed for the New Orleans Company or its successors or assigns shall in receivership or bankruptcy proceedings elect not to adopt or be bound by this agreement, then the New Orleans Company, its successors, assigns, receivers or trustees shall be excluded from the jointly used tracks until such time as an agreement substantially in the same terms herewith shall be in effect between the parties hereto or their respective successors or assigns.

In the event that either party, its successors or assigns, receivers or trustees, or other party or parties coming into possession of its property, shall default in the payment of its share of the expense of constructing and maintaining the jointly owned tracks or a part thereof, or default in any other of its obligations with respect to said jointly owned tracks as provided in this agreement, and such default shall continue for ninety days after written notice thereof, then such party in default shall be excluded from the jointly owned tracks until such time as the default shall be made good.

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION**

THE KANSAS CITY SOUTHERN
RAILWAY COMPANY,

Plaintiff,

vs.

BNSF RAILWAY COMPANY,

Defendant.

Civil Action No. 5:13-CV-98

Judge _____

Magistrate Judge _____

**EXHIBIT TO THE KANSAS CITY SOUTHERN RAILWAY COMPANY'S
COMPLAINT FOR DECLARATORY JUDGMENT**

EXHIBIT 2 -- 1940 AGREEMENT

- 17 -

~~then, again subject to the preceding paragraphs of this section,~~
the loss shall be borne equally by the parties hereto.

(f) **Idemnity:** If either party hereto shall at any time pay or be compelled to pay any sum or sums for which the other party is wholly or partially liable, or bound, under this Section 12, then such other party shall indemnify and hold such party harmless, and shall reimburse to it such sum or sums which shall be properly chargeable against it according to the terms of this Section 12, provided neither party shall be concluded or bound by any judgment against the other party hereto unless it has had reasonable notice that it is required to defend or participate in the defense of any suit, and has had reasonable opportunity to make such defense or participate therein. When such notice and opportunity shall have been given, the party notified shall be concluded and bound by the judgment as to all matters which could have been litigated in such suit.

13. **CLASSIFICATION OF ACCOUNTS:** The then current Classification of Accounts prescribed by the Interstate Commerce Commission shall govern all charges covering expenditures for additions and betterments, and for maintenance except as herein otherwise specifically provided.

14. **ARBITRATION:** Should a controversy arise between the parties hereto that cannot be amicably settled by themselves with respect to the interpretation or performance of their obligations, rights or duties under the provisions of this agreement, it shall

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be referred to three disinterested competent arbitrators, of whom each party hereto shall choose one, and the two thus chosen shall select the third.

If the two arbitrators so chosen by the parties hereto cannot within thirty days, agree upon a third arbitrator, said third arbitrator shall be selected by a Judge of the United States District Court for the District in which Lake Charles, Louisiana, is located.

The party desiring arbitration shall give written notice thereof to the other party, setting forth therein the matter in dispute and the name of its arbitrator. In the submission to arbitration it shall be provided that the arbitrators shall determine and adjudicate the questions submitted in accordance with the competent, relevant and material evidence introduced, and that in reaching their decision the said arbitrators shall be governed by the principles and rules of law or equity applicable to the questions under consideration. In the event the party upon whom such notice is served shall not within thirty days thereafter appoint an arbitrator and give notice thereof in writing to the party desiring arbitration, then the party desiring arbitration shall apply to said United States District Judge who shall select such second arbitrator, and the two thus selected shall choose a third. The three arbitrators shall promptly give notice to each of the parties to the controversy, at least ten days in advance, of the time and place set for hear-

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~~ing, and at the time and place appointed shall proceed, hear and~~
determine the matter, unless for good cause (of which the arbitrators shall be sole judge) it shall be postponed. The determination, made in writing, of the arbitrators, or of a majority of them, after due hearing, shall be final and conclusive on the parties hereto.

Each party shall pay for the services and expenses of the arbitrator chosen by or for it and of its witnesses, the losing party to pay for the services and expenses of the third arbitrator and for any stenographic expense, unless other provision therefor is made in the award.

15. TERM; SUCCESSORS AND ASSIGNS: This agreement and all of its terms, provisions and conditions shall inure to the benefit of and be binding upon the successors, leasees and assigns of the respective parties hereto; provided that if the New Orleans Company shall fail to pay the rental and other sums required of it promptly when due, or shall fail to comply with its other covenants in Articles I and II, and such default in payment, or in compliance with other covenants, shall continue for a period of 180 days after written notice from the Kansas City Company specifying in which particulars it is in default, then the Kansas City Company may immediately terminate said grant and exclude the New Orleans Company from the jointly used tracks; provided further that any termination, except by mutual consent,

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

THE KANSAS CITY SOUTHERN)	Civil Action No. 5:13-CV-98
RAILWAY COMPANY,)	
)	
Plaintiff,)	
vs.)	Judge _____
)	
BNSF RAILWAY COMPANY,)	
)	
Defendant.)	Magistrate Judge _____

EXHIBIT TO THE KANSAS CITY SOUTHERN RAILWAY COMPANY'S
COMPLAINT FOR DECLARATORY JUDGMENT

EXHIBIT 3 – 1948 AGREEMENT

Section 16. Injury or damage resulting from the sole negligence of either party hereto shall be paid for by said negligent party, but if injury or damage result from the joint or concurring negligence of both parties, or if it cannot be determined whose negligence caused by said injury or damage, compensation therefor as provided in Section 15 above, shall be paid equally by parties.

Section 17. Sums paid out by one party hereto, which hereunder should have been paid by the other party, shall be repaid to the party so paying; provided, in the event of payment of a judgment, the party obligated to reimburse the party paying shall first have been notified in writing of the suit in reasonable time to have defended same.

Section 18. Rights and obligations hereunder that cannot be settled by parties, shall be settled by arbitration in the usual manner, and if arbiters selected by parties cannot agree upon the third arbiter, he shall be selected by a Judge of the United States District Court, in which Lake Charles is located. A determination in writing of the arbiters shall be binding upon the parties. Each party shall pay for its arbiter, and the losing party shall pay for services and expenses of the third arbiter.

Section 19. Terms hereof shall bind parties, their successors and assigns for five years from the date hereof, and thereafter until twelve (12) months written notice of intention to terminate the agreement be given one party by the other; providing parties agree neither shall sell, lease or transfer its interest in the jointly owned tracks, or any part thereof, without advance written approval by the other party;

IN WITNESS WHEREOF, parties have had this agreement executed as of

March 29th, 1948.

ATTEST

Assistant Secretary

SECRETARY

Secretary

G. E. Herbert

RECOMMENDED

General Manager

APPROVED AS TO FORM:

General Attorney

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,

BY R. A. Damm
President

TEXAS AND NEW ORLEANS RAILROAD COMPANY,

BY J. A. P.
Executive Vice President

APPROVED AS TO FORM + content

J. R. Brown
General Counsel

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION**

THE KANSAS CITY SOUTHERN
RAILWAY COMPANY,

Plaintiff,

vs.

BNSF RAILWAY COMPANY,

Defendant.

Civil Action No. 5:13-CV-98

Judge _____

Magistrate Judge _____

**EXHIBIT TO THE KANSAS CITY SOUTHERN RAILWAY COMPANY'S
COMPLAINT FOR DECLARATORY JUDGMENT**

EXHIBIT 4 – 1955 AGREEMENT

participate in the defense of any sum, and has had reasonable opportunity to make such defense or participate therein, when such notice and opportunity shall have been given, the party notified shall be concluded and bound by the judgment as to all matters which could have been litigated in such suit.

EIGHTH: Should a controversy arise between the parties hereto that cannot be amicably settled by themselves with respect to the interpretation or performance of their obligations, rights or duties under the provisions of this agreement, it shall be referred to three disinterested competent arbitrators, of whom each party hereto shall choose one, and the two thus chosen shall select the third.

If the two arbitrators so chosen by the parties hereto cannot within thirty (30) days, agree upon a third arbitrator, said third arbitrator shall be selected by a Judge of the United States District Court for the District in which Lake Charles, Louisiana, is located.

The party desiring arbitration shall give written notice thereof to the other party, setting forth therein the matter in dispute and the name of its arbitrator. In the submission to arbitration it shall be provided that the arbitrators shall determine and adjudicate the questions submitted in accordance with the competent, relevant and material evidence introduced, and that in reaching their decision the said arbitrators shall be governed by the principles and rules of law or equity applicable to the questions under consideration. In the event the party upon whom such notice is served shall not within thirty (30) days thereafter appoint an arbitrator and give notice thereof in writing to the party desiring arbitration, then the party desiring arbitration shall apply to said United States District Judge who shall select such second arbitrator, and the two thus selected shall choose a third. The three arbitrators shall promptly give notice to each of the parties to the controversy, at least ten (10) days in advance, of the time and place set for hearing, and at the time and place appointed shall proceed, hear and determine the matter, unless for good cause (of which the arbitrators shall be sole judge) it shall be postponed. The determination, made in writing, of the arbitrators, or of a majority of them, after due hearing, shall be final and conclusive on the parties hereto.

Each party shall pay for the services and expenses of the arbitrator chosen by or for it and of its witnesses, the losing party to pay for the services and expenses of the third arbitrator and for any stenographic expense, unless other provisions therefor is made in the award.

NINTH: Terms hereof shall bind parties, their successors and assigns for five years from the date hereof, and thereafter until twelve (12) months written notice of intention to terminate the agreement be given one party by the other; providing parties agree neither shall sell, lease or transfer its interest in the jointly owned tracks, or any part thereof, without advance written approval by the other party.

TENTH: Agreement dated February 21st, 1929, between the Louisiana Western Railroad Company and Kansas City Shreveport & Gulf Railway Company, and supplement thereto dated February 19th, 1946, between the parties hereto, are hereby cancelled effective upon the completion of the trackage herein described.

IN WITNESS WHEREOF, the parties hereto have executed this agreement in duplicate, on this the 26th day of July A. D. 1954.

RECOMMENDED:

[Signature]
General Manager
[Signature]
Chief Engineer

TEXAS AND NEW ORLEANS RAILROAD COMPANY

By [Signature]
Vice President

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

APPROVED AS TO FORM:

[Signature]
General Attorney

By [Signature]
Vice President

APPROVED AS TO FORM

[Signature]
General Counsel

APPROVED:

[Signature]
Assistant to President

APPROVED:

[Signature]
Chief Engineer

[Signature]
Chief Engineer